UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RUDOLPH A. BUCKLEY, M.D., **Plaintiff,** **v.** **SLOCUM DICKSON MEDICAL GROUP, PLLC, as successor in interest to SLOCUM-DICKSON MEDICAL GROUP, P.C.,** **Defendant.**	**REPLY AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION FOR AN AWARD OF POST-JULY 29, 2013 ATTORNEYS' FEES** Civil Case No. 6:10-CV-00974 (DNH-ATB) Hon. David N. Hurd, U.S. District Judge

STATE OF NEW YORK }
COUNTY OF ONEIDA } ss.:

JOSEPH S. DEERY, JR., being duly sworn, deposes and states:

(1) I make this affidavit in (a) support of the application (the "Second Application") of Plaintiff Rudolph A. Buckley, M.D. ("Buckley") for an award of attorneys' fees pursuant to contracts entered into between the parties and (b) in reply to the response by the defendant, Slocum-Dickson Medical Group, PLLC, as successor in interest to Slocum Dickson Medical Group, P.C. ("Slocum") consisting of (i) an affidavit of Anthony J. Piazza, Esq., sworn to on the 7th. day of April, 2015 (the "Piazza Affidavit") and (ii) Defendant's Memorandum of Law in Opposition to Plaintiff's Second Motion for Attorneys' Fees (the "Slocum Memorandum of Law").

I. PLAINTIFF'S FEE APPLICATION IS PROPERLY BEFORE THIS COURT

(1) Buckley's application for attorneys' fees is not premised upon any Federal attorneys' fees shifting statute allowing for an award of attorneys' fees based upon a litigant's success, but, instead, upon his contractual rights to same under both the Employment Agreement [Eadline Aff., Ex. A, ECF No. 25-1] and Severance Agreement [Eadline Aff., Ex. B, ECF No.

25-2]. That Buckley "has failed to identify the procedural basis pursuant to which counsel fees are sought," [Slocum Memorandum of Law; Dkt. No. 63-9] is simply not true. This Court continued its ancillary jurisdiction over the litigants relative to New York state court litigation moved to the Federal courts by Slocum.

(2) In support of its argument that this Court "is not authorized to determine in the first instance whether an award of attorneys fees is warranted for the appellate phase of the proceedings" [Slocum Memorandum of Law; Dkt. No. 63-7], Slocum cites irrelevant caselaw relating to cases that have limited application to attorney fees applications under the fee-shifting statutes, wherein the determination of appellate attorneys' fees, *by statute and common law*, is reserved unto the appellate court; *to wit*: **(a) *Quarantino v. Tiffany & Co.*, 166 F.3d 422, 428 (2d Cir. 1999) [Slocum Memorandum of Law; Dkt. No. 63-7]:** a case where plaintiff appealed from an order of the United States District Court for the Southern District of New York awarding half the attorney's fees she recovered at trial on her pregnancy discrimination and retaliation claims under the fee-shifting statute Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e *et seq*. This statute specifies that a prevailing plaintiff in civil rights litigation under Title VII is eligible to receive a reasonable attorneys' fee. Nothing in this case supports Slocum's proclamation that "If the Second Circuit determined that appellate counsel fees were warranted in this case. . .the Second Circuit would have included a directive for Plaintiff to seek such fees before the district court" [Slocum Memorandum of Law; Dkt. No. 63-7]. To the contrary, the Second Circuit "direct[ed] the [District] court to include in the final award. . .reasonable attorney's fees for services rendered in the successful prosecution of this appeal," *Quaratino v. Tiffany*, 166 F.3d at 428); **(b) *Big Tree Enters. v. Mabrey*, 1994 U.S. App. LEXIS 36669 (10th Cir. 1994) [(Slocum Memorandum of Law; Dkt. No. 63-7)]:** This case involved a defendant

copyright violator who challenged the judgment of the U.S. District Court for the District of Kansas, which granted plaintiff copyright holders' motion for summary judgment in a copyright infringement action. Plaintiff made a request for *statutory* attorneys' fees under the fee-shifting statute 17 U.S.C., which provides:

> § 505. Remedies for infringement: Costs and attorney's fees
>
> In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

Though this case is irrelevant, I note that, once again, the issue of the determination of reasonable appellate attorneys' fees was remanded to the district court "with instructions to determine reasonable attorneys' fees to be awarded Plaintiffs for the preparation of this appeal," *Big Tree v. Mabrey*, 1994 U.S. App. LEXIS 36669 at*5. Furthermore, the U.S. District Court in this case initially admonished readers that "THIS ORDER AND JUDGMENT IS [sic] NOT BINDING PRECEDENT. . .," *Big Tree v. Mabrey*, 1994 U.S. App. LEXIS 36669 at *1; **(c) *Smith v. Bowen,* 867 F.2d 731 (2d Cir. N.Y. 1989) [(Slocum Memorandum of Law; Dkt. No. 63-7)]:** In this case, the Appellant disability applicant sought review of a decision of the United States District Court for the Eastern District of New York, which denied appellant's application for attorney's fees under the fee-shifting statute Equal Access to Justice Act, 28 U.S.C. S. § 2412(d), for litigation involved in an action for disability benefits. Slocum's recitation of the holding in this case is not correct when it states "a district court in this Circuit is not authorized to determine in the first instance whether an award of attorneys' fees is warranted for the *appellate* phase of the proceedings" [(Slocum Memorandum of Law; Dkt. No. 63-7)]. The reason that an award of appellate attorneys' fees *in statutory provided attorneys' fees cases* is to be determined by the appellate court is that the governing statutes so provide and the appellate court must first "turn to the merits of [the] appeals. . .[which] begins with [the District Court's] ruling that the underlying [statutory] decision denying [ ] disability benefits. . .was substantially justified," *Smith v. Bowen,* 867 F.2d at 734. In our case, the merits of Buckley's appeal have already been determined by the Second Circuit and, once again, this application for attorneys' fees is not premised upon a statute; **(d) *McCarthy v. Bowen,* 824 F.2d 182 (2d Cir. N.Y. 1987) [(Slocum Memorandum of Law; Dkt. No. 63-7, 8)]:** This case involved a motion by plaintiffs-appellees for appellate attorney's fees pursuant to yet another fee-shifting statute; the Equal Access to Justice Act, 28 U.S.C.A. § 2412(d)(1)(A). It was also cited by the Second Circuit in *Smith v. Bowen,* 867 F.2d at 736 for the holding that "appellate fees in this Circuit should be filed directly with the Court of Appeals."

Slocum quotes the Second Circuit thusly:

> . . .the Second Circuit held that, '[w]hen fees are sought for [an] attorney's services rendered in connection with an appeal, the court of appeals is the appropriate court to determine' whether **the conditions for making a fee award have been satisfied** [emphasis added] 824 F.2d 182, 183 (2d Cir. 1987). . .Any request for appellate fees "should therefore ***always*** be presented to the Court of Appeals." [ ] (emphasis supplied). [(Slocum Memorandum of Law; Dkt. No. 63-7, 8)]

Correctly stated to the Court, it held [emphasis added to show Slocum's incorrect reference]:

> Initially we must determine whether the request for EAJA appellate fees should be considered in the first instance by this Court or by the District Court. Under EAJA "a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort) . . . brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C.A. § 2412(d)(1)(A). When fees are sought for

> attorney's services rendered in connection with an appeal, the court of appeals is the appropriate court to determine whether **the position of the United States was "substantially justified" or whether "special circumstances make an award unjust." An application for appellate fees under EAJA should therefore always be presented to the court of appeals.**

"Any request for appellate fees" appears nowhere in this holding; and **(e)** ***Davidson v. City of Avon Park*, 848 F.2d 1172 (11th Cir. 1988)**, one more irrelevant statutory fee-shifting case brought under The Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C. § 1988.

(3) In support of its argument that "District courts in this state have consistently denied appellate counsel fee applications that were directed to the district court, as opposed to the circuit court" [(Slocum Memorandum of Law; Dkt. No. 63-8)], Slocum incorrectly cites the holdings in the following cases: **(a)** ***Brady v. Walmart Stores, Inc.*, 2010 U.S. Dist. LEXIS 115380 (E.D.N.Y. 2010):** This was a statutory discrimination case brought by a former employee against a former employer under a fee-shifting statute wherein the Eastern District Court cited the appellate court thusly: "the appropriate determination of the size of attorneys' fees and costs in this case, *even for work done on the appeal*, is best left to the discretion of the district court to decide in the first instance. . .While 'parties should file appeal-related attorney's fee applications in the circuit court, so that it can determine whether district court assistance is required,' the "determination of a reasonable attorney's fee **under the fee-shifting statutes** [*emphasis added*] should normally be decided by the district court in the first instance." *Dague v. City of Burlington*, 976 F.2d 801, 804 (2d Cir. 1992). Nowhere does this case support Slocum's argument that "District courts in this state have consistently denied appellate counsel fee applications that were directed to the district court." Furthermore, the Second Circuit made it abundantly clear that the appellate attorney fees awards be decided by the appellate court had limited application to attorney fees applications under the fee-shifting statutes and **(b)** ***Eames v.***

***Shalala* (cited by Slocum as *Eames v. Sulliva)*, 1994 U.S. Dist. LEXIS 13501 (W.D.N.Y. 1994):** Plaintiff applicant sought an attorney fees award for his counsel against defendant Secretary of Health and Human Services after he was awarded Supplemental Security Income benefits based on disability under another statutory fee-shifting statute; Title XVI of the Social Security Act, 42 U.S.C.S. § 1381 *et seq*. Another irrelevant statutory fee-shifting case; however, once again, the Second Circuit remanded to the District Court the issue of "a determination of the appropriate amount of an award for the appellate work," *Eames v. Shalala* (cited by Slocum as *Eames v. Sulliva)*, 1994 U.S. Dist. LEXIS 13501 at *5.

(4) Under the Federal statutory framework, taxable "costs" are limited to those items set by statute, *Federal Civil Rules Handbook*, Rule 54(d) - Costs and Attorney's Fees, Baicker-McKee Janssen Corr, West Publishing. In the absence of a federal statute to the contrary, attorney's fees may not be taxed as costs beyond the modest provisions set forth in 28 U.S.C.A. § 1923, *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). Therefore, "costs" do not include attorney fees' as may otherwise be provided for by contract between the parties. Slocum's recitation that "any Mandate to the district court is required to set forth 'any direction about costs'" has no relevance to this motion. [(Slocum Memorandum of Law; Dkt. No. 63-8)]

(5) Slocum characterizes this Court's holding in *Butts v. Astrue,* 565 F. Supp.2d 403, 404 (N.D.N.Y. 2008) as being the "same" as that in *Davidson v. City of Avon Park,* 848 F.2d 1172 (11th Cir. 1988) (another statutory fee-shifting case brought under the auspices of the Equal Access to Justice Act (the "EAJA"), 28 U.S.C.S. § 2412). [Slocum Memorandum of Law; Dkt. No. 63-8]. In the Northern District case, this Court, citing the Second Circuit in another fee-shifting statute case (*Smith v. Bowen,* 867 F.2d 731, 736 (2d Cir. 1989)) involving the EAJA

(Second Circuit having held that *applications under the EAJA for appellate fees* in the Second Circuit should be filed directly with the Court of Appeals), stated that, in accordance with the Local Rules of the Second Circuit, this Court will not consider an award of attorneys' fees for *EAJA work* done related to the Plaintiff's appeal, 2d Cir. R. § 0.25.

II. PLAINTIFF'S FEE APPLICATION IS TIMELY BEFORE THIS COURT; FRCP RULE 54 (D) DOES NOT APPLY

(6) Slocum makes much ado about Buckley's motion papers not having been timely filed pursuant to FRCP Rule 54 [(Slocum Memorandum of Law; Dkt. No. 63-9)] FRCP Rule 54(d)(2) states that "A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages." Contracts are an exceptional case where "the substantive law requires those fees to be proved at trial as an element of damages." The very next section of the Rule mandates that such a motion must be filed no later than 14 days after the entry of judgment. The facts that this rule applies to the District Court, Buckley's situation falls under the substantive law exception and Buckley had not incurred appellate attorneys' fees demonstrate he could not bring such a 14-day motion and, thus, the Rule has no applicability in this situation.

(7) Furthermore, and more importantly, the Advisory Committee Notes to Rule 54(d)(2) state that the procedure outlined in that Rule "does not . . . apply to fees recoverable as an element of damages, as when sought under the terms of a contract (as they are by Buckley); such damages typically are to be claimed in a pleading (as they were by Buckley; Dkt. No. 1 at page 11) and may involve issues to be resolved by a jury." Advisory Committee's 1993 Note on subd. (d), par. (2) of Fed. Rule Civ. Proc. 54, 28 U. S. C. App., pp. 240-241. Consequently, FRCP Rule 54(d)(2) and the filing time frame set forth thereunder have no relevance or application in this case.

III. MR. SINKER IS NOT PRACTICING LAW

(8) Slocum attempts to downplay the New York Court of Appeals' ruling in *In Matter of Rowe*, 80 N.Y.2d 336 (1992), which reversed the First Department in *In re Rosenbluth,* 36 A.D.2d 383 (1st Dept. 1971) by arguing that "a **suspended** attorney [was permitted] to run a **calendar watching service**." Slocum apparently bold-fonted these words as if they were significant to the Court of Appeals decision. However, the fact of the matter is, these highlighted words have little significance. Indeed, an undistorted reading of the highest State Court's ruling may be found in a single quote:

> The Appellate Division, by applying its order. . .improperly "prohibit[ed] [the suspended attorney] from engaging in endeavors which he could have undertaken had he never been admitted to the Bar in the first place" (*see, Matter of Rosenbluth*, 36 A.D.2d 383, 384) *In Matter of Rowe*, 80 N.Y.2d at 342.

(9) I respectfully submit that Slocum's numerous cites to Nassau County Bar Association opinions, Second Department caselaw etc. are all irrelevant or, to the extent that they deviate from this Court of Appeals decision, erroneous.

(10) Slocum also ignores the fact that the Court of Appeals has also defined the "practice of law" thusly: "The practice of law involves the rendering of legal advice and opinions **directed to particular clients**," [*emphasis added*] *In re Rowe,* 80 N.Y.2d at 341-342. Mr. Sinker, on behalf of our Firm , has not violated that definition, and there is no evidence whatsoever before this Court that Mr. Sinker has ever practiced law without a license.

(11) Slocum seeks to create a nonexistent distinction between "legal research" and "paralegal research," (Piazza Affidavit, ¶ 44). There exists no such distinction. Period.

(12) Attorney Piazza concludes that Mr. Sinker has somehow breached some agreement with the Grievance Committee (Piazza Affidavit, ¶ 48) by changing his fliers to read

"Legal Research" instead of "Paralegal Research." The latter would be less confusing, but the research duties would be the same. These changes do not constitute representations to the Grievance Committee. He may perform legal research, but may not "practice law."

(13) *Prior to commencing his business*, Mr. Sinker gave written notice to both the Fourth Department and the Grievance Committee. He has never been asked by either the Fourth Department or its Grievance Committee to cease and commence his paralegal activities. These facts should put at rest Slocum's accusations.

IV. CROSS-APPEAL ATTORNEY FEES

(14) Slocum, in Point III of its Memorandum of Law, doesn't grasp the concept that the fee-shifting standards under Federal statutes which are premised upon litigative success do not apply in this case. Neither the Employment nor the Severance Agreement premise entitlement of attorneys' fees on litigative success; but, instead, Article 20 of the Employment Agreement provides for Plaintiff's entitlement to an award of "all reasonable attorneys' fees incurred in enforcing his[ ] rights under [the Employment] Agreement:"

> **20. ATTORNEYS' FEES**
>
> The Employer shall be entitled to recover from the Employee, the Employer's costs, expenses, and all reasonable attorneys' fees incurred in enforcing its rights under this Agreement. Conversely, the Employee shall be entitled to recover from the Employer, the Employee's costs, expenses, and all reasonable attorneys' fees incurred in enforcing his/her rights under this Agreement.

(15) Perhaps Buckley might not have cross-appealed had Slocum not commenced its appeal. Regardless, under the Agreements, Buckley is entitled to full attorneys' fees "incurred in enforcing its rights under this Agreement" without consideration of his success on his cross-appeal.

(16) I find it troubling that Attorney Piazza would submit as an exhibit (Piazza Exhibit A) a letter I sent to him between attorneys for settlement purposes only. As far as reasonableness goes, perhaps our two firms should each submit our billings to this Court. I am certain this firm is billing only a fraction of what Mr. Piazza's firm is billing Slocum.

JOSEPH S. DEERY, JR., ESQ.
Bar Roll # 601272

Sworn to before me this 13th. day
of April, 2015.

NOTARY PUBLIC
Appointed in Oneida County
My Commission Expires 3/11/2018

SARAH M. BRINSKI, ESQ.
Notary Public, State of New York
No. 02BR6298962
Qualified in Herkimer County
Commission Expires 03/17/2018

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RUDOLPH A. BUCKLEY, M.D., **Plaintiff,** **v.** **SLOCUM DICKSON MEDICAL GROUP, PLLC, as successor in interest to SLOCUM-DICKSON MEDICAL GROUP, P.C.,** **Defendant.**	**CERTIFICATE OF SERVICE** Civil Case No. 6:10-CV-00974 (DNH-ATB) Hon. David N. Hurd

I hereby certify that on April 13, 2015, I electronically filed a REPLY AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION FOR AN AWARD OF POST-JULY 29, 2013 ATTORNEYS' FEES of Joseph S. Deery, Jr., Esq. sworn to on the 13th. day of April, 2015 with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to the following:

HISCOCK & BARCLAY, LLP
Anthony J. Piazza, Esq.
Attorneys for the Defendant Slocum-Dickson
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And, I hereby certify that there are no non-CM/ECF Participants requiring regular mail service.

JOSEPH S. DEERY, JR., ESQ.